

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MELISSA WHEELER, No. CIV. S 03-2090 MCE GGH
Plaintiff,
v. MEMORANDUM AND ORDER
CSK AUTO, INC., and DOES 1-
100, Inclusive, Defendants.

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Plaintiff Melissa Wheeler, a former employee of Defendant CSK Auto, Inc.¹ ("CSK"), challenges the events surrounding her termination by CSK through the present lawsuit. Plaintiff raises five causes of action in her complaint: (1) sex discrimination under California's Fair Employment and Housing Act (FEHA), (2)

¹In California, CSK Auto, Inc. operates under the name "Kragen Auto Parts."

wrongful termination (breach of contract), (3) wrongful termination in violation of public policy, (4) defamation, and (5) failure to compensate all hours worked.

Wheeler originally filed her complaint in state court. CSK removed to the case to this Court based on diversity of citizenship under 28 U.S.C. §§ 1332 and 1441(b). Presently before the Court is CSK's motion for summary judgment or, in the alternative, for summary adjudication. For the reasons stated below, CSK's motion for summary judgment is granted.²

BACKGROUND

1. At-will Employment

On July 27, 1997, CSK hired Wheeler as a cashier at its Fairfield, California store. Wheeler's application for employment included a provision, which she signed, acknowledging that she would be an at-will employee and that either she or CSK could terminate her employment at any time and with or without cause.³ (Wheeler Dep. Exhibit 9). The application's at-will provision also stated that employment terms could only be changed by a written agreement with CSK's president. (Wheeler Dep. Exhibits 7, 9).

²Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

³In 1998, when requesting a transfer, Wheeler signed a second at-will employment provision that was part of the application for employment. (Wheeler Dep. Exhibit 8).

1 Once hired, Wheeler attended an orientation meeting where
2 she received a copy of CSK's Conduct of Associates⁴ along with
3 the Associate Handbook. The Conduct of Associates included a
4 brief description of CSK's at-will employment policy. The
5 Associate Handbook also included the at-will employment policy as
6 well as a form that employees are required to sign acknowledging
7 that their employment with CSK is at-will. Wheeler signed this
8 form and a checklist acknowledging that she had received a copy
9 of the Conduct of Associates and the Associate Handbook and that
10 a supervisor had thoroughly discussed the policies contained
11 therein. (Wheeler Dep. 121:16-122:3; Wheeler Dep. Exhibit 10).

12 In April of 2001, CSK promoted Wheeler to store manager at
13 its Antioch, California store. In March 2003, Wheeler was
14 transferred to CSK's Fulton/Cottage store in Sacramento,
15 California. As store manager, Wheeler was responsible for
16 supervising, training, hiring, and firing clerks. In particular,
17 Wheeler was responsible for training each new hire on the
18 materials contained in CSK's new hire packet. This packet
19 included CSK's Associate Handbook and the Conduct of Associates,
20 which, as enumerated above, set forth CSK's policy of at-will
21 employment. Wheeler was also responsible for obtaining the signed
22 acknowledgment form of CSK's at-will policy from each new
23 employee.

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27 ⁴Conduct of Associates is a brief description of CSK's
28 polices and procedures.

1 **2. CSK's Sick Leave Policy**

2 CSK provides sick leave, vacation time, and personal days
3 for its employees. Sick leave and personal days are
4 distinguishable from vacation time in that they are not vested
5 benefits and are not paid out to employees upon termination.
6 CSK's sick leave policy states that sick leave is only to be used
7 "when an injury of the associate prevents the associate from
8 coming to work." (Wheeler Dep. Exhibit 4; Adam Decl. ¶15; Roscoe
9 Decl. ¶5). The sick leave policy is included in CSK Operations
10 Manual and is made available to employees online. (Wheeler Dep.
11 34:5-15, 35: 13-16; Wheeler Dep. Exhibit 4).

12 While employed as store manager at CSK's Fulton/Cottage
13 store in Sacramento, it is undisputed that Wheeler used sick
14 leave to supplement employees' hours for non-illness related
15 absences. On Sunday June 8, 2003, Wheeler called Leonard ("Skip")
16 Shields, her First Assistant Manager, and asked if he could
17 assist her boyfriend, Francisco Mejia, in repairing her car.
18 Shields agreed to help Mejia repair Wheeler's car that day but
19 they were unable to finish the repair. Shields offered to
20 complete the repair on his next scheduled day off but Mejia could
21 not secure that day off from work. Wheeler then offered Shields
22 Monday, June 9, 2003, off work so Shields could help Mejia finish
23 repairing her car.

24 Wheeler used sick leave to pay Shields for the eight hours
25 of work on Monday, June 9, 2003 that Shields missed while he was
26 assisting Mejia in repairing her car. Later that week, on June
27 12, 2003, Wheeler again used sick leave to supplement Shields'
28 hours after Shields attended a training meeting. Wheeler asked

1 Shields if he wanted to go home early because another employee
2 had requested additional hours. Wheeler then gave Shields the
3 night off and paid him five hours of sick leave.

4 Wheeler admits that when an employee took time off for a
5 non-illness related reason she would exhaust the employee's
6 personal days and sick leave before using vacation time. (Wheeler
7 Dep. 152:15-153:2). Wheeler also admits that she knew that
8 employees would lose their personal days and sick leave if they
9 did not use them. (Wheeler Dep. 152:17-23).

11 **3. CSK Investigation on Wheeler's Use of Sick Leave**

12 Wheeler's practice of using sick leave to pay employees for
13 non-illness related time off was brought to CSK's attention after
14 an employee requested and was denied a sick day. Steve McCall,
15 the Fulton/Cottage store's Assistant Manager, called Wheeler on
16 June 10, 2003 to request the day off because he had injured his
17 arm over the weekend. Wheeler denied McCall's request.

18 On June 12, 2003, McCall overheard a conversation between
19 two employees who stated that Wheeler had given Shields Monday,
20 June 9, 2003 off so that Shields could assist Mejia in repairing
21 her car and that she had used sick leave to compensate Shields
22 for his time off. McCall made a complaint against Wheeler to
23 CSK's Regional Human Resource Manager Bret Adam based on his
24 belief that he had been denied the day off because Shields had
25 received June 9 off.

26 Adam and CSK loss prevention agent, Dave Fullerton,
27 conducted an investigation into Wheeler's use of sick leave. Adam
28 and Fullerton interviewed Wheeler as well as McCall and Shields.

1 In addition to confirming his earlier allegations, McCall
2 informed Adam and Fuller that Wheeler had been supplementing his
3 regular work hours with sick leave when his hours were cut back
4 due to slow business.

5 In her interview, Wheeler admitted that she had used sick
6 leave to supplement employees' hours for non-illness related time
7 off. (Wheeler Dep. Exhibit 14; Adam Decl. ¶13). Wheeler also
8 admitted to paying Shields eight hours of sick leave for the day
9 he missed work to help Mejia fix her car and for the day he left
10 early after a training meeting (Wheeler Dep. 148:21-149:13;
11 Wheeler Dep. Exhibit 14; Adam Decl. ¶¶11-13).

12 In his interview, Shields confirmed that Wheeler gave him
13 Monday June 9, 2003 off work so that he could help Mejia repair
14 Wheeler's car and that Wheeler had paid him eight hours of sick
15 leave for that day. (Wheeler Dep. Exhibit 14; Adam Decl. ¶¶10,
16 12). Shields also confirmed that Wheeler had paid him five hours
17 of sick leave for the evening of June 12, 2003 that she had given
18 him off work. (Wheeler Dep. Exhibit 14; Adam Decl. ¶¶10, 12).

19 On July 3, 2003, Adam and Fullerton, along with District
20 Manager Phillip Kuhn, Divisional Asset Protection Manager Jay
21 Plassmeyer, Regional Vice President Ken Roscoe, Senior Human
22 Resources Manager Sonya Granillo-Cathey, and Assistant General
23 Counsel James Wigle reviewed the investigation report and
24 discussed the appropriate level of discipline for Wheeler. After
25 receiving input and recommendations from the Legal, Human
26 Resources, and Loss Prevention Departments, Roscoe and Kuhn
27 decided to terminate Wheeler's employment for misuse of CSK's
28 sick leave policy and for falsifying documents. CSK also

1 terminated Shields and McCall for misuse of CSK's sick leave
2 policy and for falsifying documents.

3
4 **STANDARD**

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6 In considering a motion for summary judgment, the court must
7 examine all the evidence in the light most favorable to the non-
8 moving party. United States v. Diebold, Inc., 369 U.S. 654, 655
9 (1962). According to Federal Rule of Civil Procedure 56(c),⁵
10 summary judgment is proper where no genuine issue of material
11 fact exists. The moving party may demonstrate that no genuine
12 issue of material fact exists by showing "an absence of evidence
13 to support the nonmoving party's case." Celotex Corp. V. Catrett,
14 477 U.S. 317, 325 (1986). Once the moving party satisfies these
15 requirements of Rule 56, the burden shifts to the party resisting
16 the motion, who "must set forth specific facts showing that there
17 is a genuine issue for trial." Anderson v. Liberty Lobby, Inc.,
18 477 U.S. 242, 256 (1986). In evaluating evidence at the summary
19 judgment stage, the court does not weigh conflicting evidence.
20 See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d
21 626, 630-631 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co
22 v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

23 Rule 56 also allows a court to grant summary adjudication on
24 part of a claim or defense. Fed. R. Civ. P. 56(a). The standard
25 that applies to a motion for summary adjudication is the same as
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28 ⁵Unless otherwise stated, all references to "Rule" or
"Rules" refer to the Federal Rules of Civil Procedure.

1 that which applies to a motion for summary judgment. Mora v.
2 ChemTronics, 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998).

3
4 **ANALYSIS**

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6 **1. Failure to Timely Oppose Motion for Summary Judgment**

7 Local Rule 78-230(c) requires that the opposition to a
8 motion be filed "not less than fourteen (14) days preceding the
9 noticed . . . hearing date." The Court has discretion to
10 disregard papers filed after a filing deadline. See Pfeil v.
11 Rogers, 757 F.2d 850, 858 (7th Cir. 1985), cert. denied, 475 U.S.
12 1107 (1986) ("The filing deadline . . . assures the court . . .
13 that its decisions will be accurate because the issues will have
14 been fully briefed"), cited with approval by Ashton-Tate Corp. v.
15 Ross, 916 F.2d 516, 520 (9th Cir. 1990). Moreover, Rule 56(e)
16 requires the party opposing summary judgment to present evidence
17 showing there is a genuine issue of material fact. See also E.D.
18 Cal. Local Rule 56-260 (requiring the party opposing a motion for
19 summary judgment to file "all evidentiary documents cited in the
20 opposing papers.").

21 The hearing for CSK's motion for summary judgment was
22 originally set for June 6, 2005. On May 17, 2005, Wheeler
23 requested a continuance and on May 23, 2005 the hearing date was
24 reset for June 20, 2005. On June 16, 2005, four days before the
25 hearing date and ten days after opposition was due, Wheeler filed
26 an opposition to Defendant's motion for summary judgment as to
27 her claim that she was not compensated for all hours worked. On
28 June 17, 2005, Wheeler filed her response to Defendant's

1 undisputed facts in support of the motion for summary judgment.
2 On June 20, 2005, the date set for the hearing on the motion for
3 summary judgment, Wheeler filed an additional opposition
4 addressing the sex discrimination and wrongful termination based
5 on violation of public policy claims. In addition to her untimely
6 filings, Wheeler failed to file any of the evidentiary documents
7 cited in her opposition papers.

8 Because Wheeler neglected to adequately and timely oppose
9 CSK's motion for summary judgment, the Court strikes the
10 oppositions filed June 16 and 20, and the response to the
11 statement of undisputed material facts filed June 17, 2005.

12 On June 9, 2005, citing the Court's December 10, 2003
13 Scheduling Order, CSK requested that the Court treat Wheeler's
14 failure to oppose as consent to the motion. (CSK's Reply at 2).
15 Irrespective of Plaintiff's failure to submit a timely
16 opposition, however, the Court nonetheless cannot grant summary
17 judgment in favor of the defense unless it deems it appropriate
18 to do so following examination of the evidence and arguments
19 submitted. Martinez v. Stanford, 323 F.3d 1178, 1182-83 (9th Cir.
20 2003). The Scheduling Order provides that failure to timely
21 oppose a summary judgment motion "may result in the granting of
22 that motion *if the movant shifts the burden to the nonmovant to*
23 *demonstrate that a genuine issue of material fact remains for*
24 *trial.*" (Scheduling Order, Dec. 10, 2003 at 5) (emphasis added).
25 Thus, even if the nonmoving party has failed to timely oppose,
26 the Court must nevertheless determine whether the moving party
27 has met its burden of showing that there is no genuine issue of
28 material fact for trial. Martinez, 323 F.3d at 1182-83.

1 **2. Plaintiff's Individual Claims**

2 **a. Sex Discrimination**

3 When analyzing a discrimination claim under FEHA, the
4 allocation of burdens of proof and order of analysis follow the
5 three step pattern established by the Supreme Court in McDonnell
6 Douglas v. Green, 411 U.S. 792 (1973).⁶ Plaintiff must first
7 establish a prima facie case by showing that 1) she belongs to a
8 protected class; 2) that she was performing her job
9 satisfactorily; 3) that she was terminated, rejected for
10 employment, or otherwise subjected to a tangible employment
11 action; and 4) that this took place under circumstances giving
12 rise to an inference of unlawful discrimination. See Id. at 802;
13 see also Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248,
14 253 (1981).

15 If the Plaintiff succeeds in establishing a prima facie case
16 as outlined above, the burden shifts to the Defendant to
17 articulate a legitimate, non-discriminatory reason for the
18 adverse action taken. McDonnell Douglas, 411 U.S. at 802. If the
19 Defendant satisfies that burden, the Plaintiff must then show
20 that the reason proffered by the Defendant was merely a pretext
21 for discrimination. Id. at 804.

22 Wheeler claims she was terminated because of her sex. Her
23 claim is based on allegations that male store managers used sick
24 leave in the same manner she did but were not terminated, that
25 only three out of nineteen store managers in the district where
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27 ⁶ California has adopted the McDonnell Douglas burden-
28 shifting test for discrimination claims. Guz v. Bechtel Nat'l,
Inc., 24 Cal.4th 317, 354 (2000).

1 she was employed were female, that CSK paid higher salaries to
2 male employees than it did for similarly situated female
3 employees, that CSK did not hire females for certain job
4 positions, and that CSK used a higher standard and additional
5 criteria in its promotion of female store managers. (Wheeler
6 Compl. ¶51).

7 CSK asserts that Wheeler cannot meet her burden of
8 establishing a prima facie case of discrimination. It claims that
9 Wheeler cannot show that she was performing her job
10 satisfactorily or that she was treated differently than other
11 male store managers. However, the burden of establishing a prima
12 facie case is not an onerous one. Burdine, 450 U.S. at 253. CSK
13 has not shown that, prior to its investigation into her use of
14 sick leave, Wheeler was not performing her job satisfactorily. In
15 addition, Wheeler's declaration that she believed male store
16 managers were treated differently is sufficient to satisfy the
17 low prima facie burden.

18 We next turn to whether CSK has met its burden of showing
19 that it had a legitimate, non-discriminatory reason for
20 terminating Plaintiff. CSK has shown that it had an established
21 sick leave policy. Sick leave was to be used to compensate
22 employees for illness related absences. Wheeler violated this
23 policy by using sick leave to compensate employees for leaving
24 work early and taking days off for non-illness related reasons.
25 Wheeler admitted she used sick leave in this manner in both her
26 deposition and throughout CSK's investigation into the matter.
27 CSK terminated Wheeler after a thorough investigation determined
28 that she had violated CSK's sick leave policy. As a result of

1 that same investigation, CSK also terminated two male employees,
2 Shields and McCall, for violating the sick leave policy and for
3 falsifying time records.

4 CSK provided enough evidence to meet its burden by showing
5 that it had a legitimate, non-discriminatory reason for
6 terminating Wheeler. There is no evidence that Wheeler was
7 terminated for anything other than misusing CSK's sick leave
8 policy and falsifying documents. Thus, the burden shifted to
9 Wheeler to show that CSK's reason for terminating her employment
10 was pretextual. Because Wheeler failed to raise pretext in
11 opposition, she did not meet her burden. Accordingly, grant of
12 summary judgment on Wheeler's claim for gender discrimination is
13 appropriate.⁷

14 **b. Wrongful Termination (Breach of Contract)**

15 Most California cases have held that an express at-will
16 employment provision cannot be contradicted by proof of an
17 implied contrary understanding. Guz v. Bechtel Nat'l, Inc., 24
18 Cal. 4th 317, 340 n.10 (2000). Thus, an at-will provision in an
19 express written agreement stating that the employer can terminate
20 the employee at any time with or without cause cannot normally be
21 overcome by proof of an implied agreement to terminate for good
22 cause. Starzynski v. Capital Public Radio, Inc., 88 Cal. App. 4th
23 33, 37 (2001).

24 On two separate occasions Wheeler signed an express at-will
25

26 ⁷ In its motion for summary judgment, Defendant addresses
27 Plaintiff's disparate pay claim in the context of gender bias.
28 However, the Court need not address this issue since Plaintiff's
complaint of sex discrimination is solely based on her
termination. (Complaint ¶¶47, 51, 53, 54).

1 employment provision that was part of CSK's employment
2 application. California courts disagree as to whether an at-will
3 provision in an application for employment constitutes a valid
4 express contract. Compare Harden v. Maybelline Sales Corp., 230
5 Cal. App. 3d 1550, 1555 (1991), with Wallis v. Farmers Group,
6 Inc., 220 Cal. App. 3d 718, 730 (1990). However, Wheeler also
7 signed the at-will acknowledgment form contained in CSK's
8 Associate Handbook given to her after she was hired. Moreover, as
9 store manager, she was responsible for ensuring that new hires
10 signed the at-will acknowledgment form.

11 Wheeler claims that she had an implied contract of
12 employment with CSK that the termination of her employment could
13 only be for "good cause." Wheeler bases her contention on the
14 fact that she received several promotions during the time she was
15 employed by CSK. In addition, she claims that policies in the CSK
16 operations manual created self-imposed limitations for
17 discharging employees, thereby implying termination only for
18 "good cause." (Wheeler's Complaint ¶11).

19 CSK established that it had an express at-will employment
20 agreement with Wheeler. CSK has provided the Court with three
21 documents signed by Wheeler acknowledging that her employment was
22 at-will and could be terminated at any time with or without
23 cause. Thus, Wheeler cannot contradict this express agreement
24 with proof of an implied agreement to terminate for good cause.
25 However, even if there had been implied contract to terminate for
26 good cause, good cause was present. Wheeler has not established
27 that her termination was arbitrary or pretextual. Accordingly,
28 summary judgment on Wheeler's claim for breach of contract is

1 also appropriate.

2 **c. Wrongful Termination (Violation of Public Policy)**

3 An employer's right to terminate an at-will employee is
4 subject to limits imposed by public policy. Foley v. Interactive
5 Data Corp., 47 Cal. 3d 654, 665 (1988). Wheeler's wrongful
6 termination claim in violation of public policy is based on her
7 sex discrimination claim. Because Wheeler failed to meet her
8 burden on her sex discrimination claim, there is no basis for her
9 public policy violation claim and grant of summary judgment is
10 appropriate.

11 **d. Defamation**

12 To establish a defamation claim, Wheeler must show that the
13 communication complained of was published, false, and
14 unprivileged. Cal. Civ. Code § 46. Truth and privilege are both
15 defenses to a defamation claim. Campanelli v. Regents of Univ. of
16 California, 44 Cal. App. 4th 572, 582-83 (1996); Cal. Civ. Code §
17 47(c).

18 Wheeler's defamation complaint stems from a statement Don, a
19 human resources manager for CSK, made to Chuck Amalong, a CSK
20 district manager, who then relayed the statement to Wheeler's
21 sister, also a CSK employee. Wheeler claims Don told Amalong, who
22 then told her sister, that she was terminated for violating
23 company policy and for having an associate work on her
24 car. (Wheeler Dep. 295:16-296:3).

25 CSK claims that Wheeler's defamation claim must fail because
26 the statements regarding her termination were true. CSK further
27 contends that the statements are privileged under California
28 Civil Code § 47(c). (A communication made by an employee to

1 another employee is subject to a qualified privilege if it is
2 made, without malice, to a person interested in the
3 communication. See Deaile v. General Tel. Co., 40 Cal. App. 3d
4 841, 846-47 (1974). However, the conditional privilege can be
5 defeated if the plaintiff specifically alleges malice. Williams
6 v. Taylor, 129 Cal. App. 3d 745, 752 (1982).

7 CSK provided sufficient evidence to show that the
8 communication was true: Wheeler was terminated for violating
9 CSK's sick leave policy. In addition, because the communication
10 was between two CSK employees who had an interest in the
11 circumstances of Wheeler's termination, the communication also
12 falls within a qualified privilege. Moreover, Wheeler cannot
13 defeat the qualified privilege because she did not specifically
14 allege malice in her complaint and failed to allege it in
15 opposition. Accordingly, summary judgment on Wheeler's claim for
16 defamation is also appropriate.

17 **f. Failure to Compensate All Hours Worked**

18 Wheeler claims that CSK did not fully compensate her for the
19 hours she worked on her last pay period. CSK contends that it did
20 not receive an accurate account of Wheeler's hours when it issued
21 her last pay check but that, once it became aware of the
22 inaccuracy, it promptly paid Wheeler the amount she was owed.
23 (Adam Decl. ¶16). Because there is no opposition as to whether
24 Wheeler was fully compensated, summary adjudication on her claim
25 for failure to compensate all hours worked is appropriate.

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CONCLUSION

For the reasons stated above, CSK's motion is GRANTED in all respects. Judgment shall accordingly be entered in favor of CSK and the Clerk is directed to close this file.

IT IS SO ORDERED.

DATED: August 10, 2005

A handwritten signature in blue ink, appearing to read "Morrison C. England, Jr.", is written over a horizontal line.

MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE